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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

SEMINOLE TRIBE OF FLORIDA,
Petitioner,
v.
STATE OF FLORIDA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF AMICI CURIAE POARCH BAND OF CREEK INDIANS AND PONCA TRIBE OF OKLAHOMA IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI*

The Poarch Band of Creek Indians, a federally recognized tribe, has a cross-petition (No. 94-189) pending in this Court that raises identical issues, and arises from the same Court of Appeals ruling, as this case. *See Poarch Band of Creek Indians v. Alabama*, 776 F. Supp. 550 (S.D. Ala. 1991) and 784 F. Supp. 1549 (S.D. Ala. 1992), *aff'd, Seminole Tribe of Florida v. Florida*, 11 F.3d 1016 (11th Cir. 1994). The Ponca Tribe of Oklahoma, a federally recognized tribe, is respondent in an action (No. 94-1029) pending in this Court, which also raises the same Eleventh Amendment issue presented here. *See Ponca Tribe of Oklahoma v. State of Oklahoma*, 37 F.3d 1422 (10th Cir. 1994).

Amici have been seeking to negotiate compacts with their respective states to permit Class III gaming in accordance with the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.* This case will determine whether the Tribes' efforts will continue to be blocked—contrary to the clear intent of Congress—by the States' and Governors' claims of immunity from suit.[1]

SUMMARY OF ARGUMENT

This is an action by an Indian Tribe seeking compliance by a State and its Governor with the requirement of the Indian Gaming Regulatory Act ("IGRA")[2] that they negotiate in "good faith" regarding the Tribe's request to undertake gaming. 25 U.S.C. § 2710(d)(7)(A)(i). This case does not involve monetary or other retroactive relief. Only declaratory and prospective injunctive relief are sought. This case does not involve the exercise of Congressional power in derogation of the regulatory authority of states. On the contrary, IGRA provides states with a *greater* potential role in regulating Indian gaming than would be permissible absent IGRA, under this Court's ruling in *California v. Cabazon Band of Indians,* 480 U.S. 202 (1987). And this case does not involve a statute where Congress' intent to provide a cause of action against a state is in doubt. Congress in IGRA expressly provided for suits against states regarding the requirement of "good faith" negotiations.

The issue in this case is whether—notwithstanding the limited relief sought, the lack of intrusiveness into state authority, the breadth of Congressional power over Indian affairs, and the clear intent of Congress to permit such suits—the Governor and the State are immune from this suit under the Eleventh Amendment. As against

[1] This brief is filed with the written consent of the parties, filed with the Clerk of this Court.

[2] Pub. L. No. 100-497, 102 Stat. 2467, 25 U.S.C. §§ 2701 *et seq.*

the Governor, this action for prospective injunctive and declaratory relief, regarding a violation of federal law, is permissible under *Ex parte Young,* 209 U.S. 123 (1908). As against the State, the Eleventh Amendment is not a bar because Congress—acting pursuant to its plenary power over Indian affairs—expressly provided for such a suit against the State. At least in the narrow context of this case—where the only relief sought is prospective injunctive and declaratory relief, and where the federal statute enhances rather than diminishes state authority—Congress has the power to provide for such a suit.

STATEMENT

A. The *Cabazon* Case

In *California v. Cabazon Band of Indians,* 480 U.S. 202 (1987), this Court upheld the right of Indian tribes to undertake gaming activities on their reservations free from state regulation, where state law and public policy fail to prohibit such gaming by others. The Court held that while "state laws may be applied to tribal Indians on their reservations if Congress has expressly so provided," no federal law permitted the application of California's laws to on-reservation gaming by tribes. *Id.* at 207, 212, 214. In addition, "in light of the compelling federal and tribal interests" in Indian gaming, most notably the " 'overriding goal' of encouraging tribal self-sufficiency and economic development", the Court refused to permit state regulation of Indian gaming in the absence of federal statutory authorization. *Id.* at 216, 221.

Cabazon made clear that gaming by tribes—like other aspects of Indian affairs—is fundamentally the province of federal law. As the Court noted, " 'tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States.' " *Id.* at 207 (quoting *Washington v. Confederated Tribes of the Colville Reservation,* 447 U.S. 134, 154 (1980)).

B. The Indian Gaming Regulatory Act

Congress responded to the *Cabazon* decision by enacting the 1988 Indian Gaming Regulatory Act,[3] a comprehensive regulatory measure regarding Indian gaming. In IGRA, Congress reaffirmed the important federal interests underlying Indian gaming, including the need to "provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1).[4] At the same time, Congress provided in IGRA a mechanism for state regulatory involvement in Indian gaming—altering, to that extent, the impact of this Court's ruling in *Cabazon*.

IGRA divides gaming into three categories.[5] Class III gaming—essentially gaming other than traditional Indian games, bingo and bingo related games—was the subject of a protracted struggle in Congress, beginning some years before *Cabazon*.[6] Tribes sought to remain free from state jurisdiction over their on-reservation activity, including gaming—a position that was ultimately buttressed by this Court's decision in *Cabazon*.[7] On the

[3] 25 U.S.C. §§ 2701 *et seq.*

[4] IGRA was enacted in the context of the recognized failure of federal policy to provide other meaningful economic development opportunities in Indian country. *See* S. Rep. No. 446, 100th Cong., 2d Sess. 34 (1988) (hereafter "S. Rep.") (Additional views of Mr. McCain).

[5] Class I gaming includes traditional forms of Indian gaming such as "social games solely for prizes of minimal value. . . ." 25 U.S.C. § 2703(6). Class II gaming includes bingo and related games such as pull-tabs, punch boards, lotto, tip jars, instant bingo and "other games similar to bingo. . . ." 25 U.S.C. § 2703(7)(A)(i)(III). Class III gaming is all gaming not Class I or Class II, and includes, for instance, casino gaming, slot machines and certain forms of card gaming. 25 U.S.C. § 2703(8).

[6] *See* S. Rep. at 1-5.

[7] *See* S. Rep. at 5.

other hand, certain states sought to control Indian gaming within their borders. *See* S. Rep. at 4-6, 33. After considering these sharply contrasting views on this issue for 6 years, Congress arrived at a "delicately balanced compromise",[8] and enacted IGRA.

The "core compromise"[9] was the provision of IGRA permitting Class III gaming if, *inter alia*, such gaming is "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State. . . ." 25 U.S.C. § 2710(d)(1)(C). This compacting language provided states with an opportunity to negotiate with tribes regarding the terms under which Class III gaming may be conducted on Indian lands. While IGRA provided a list of certain topics that may be included within a compact, it did not determine how any issue should be resolved. 25 U.S.C. § 2710(d)(3)(C). The thrust of the compact provision in IGRA was that tribes and states should come to an agreement regarding how to structure Class III gaming, consistent with the interests of each.

Congress, in enacting IGRA with this compacting process, remained concerned that states not abuse the process by unreasonably refusing to enter compact negotiations, or by unreasonably refusing to agree to compact terms.[10] Accordingly, Congress provided that if a state fails to negotiate at all, or fails to negotiate in good faith the federal district courts shall have jurisdiction over

[8] 134 Cong. Rec. 25377 (daily ed. Sept. 26, 1988) (remarks of Cong. Udall) (Chairman of the House Interior and Insular Affairs Committee and primary House sponsor).

[9] 134 Cong. Rec. 25376 (daily ed. Sept. 26, 1988) (remarks of Cong. Udall).

[10] As the Senate Report on the bill which became IGRA noted:

> It is the Committee's intent that the compact requirement for class III not be used as a justification by a State for excluding Indian tribes from such gaming. . .

S. Rep. at 13.

> any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact . . . or to conduct such negotiations in good faith.

25 U.S.C. § 2710(d)(7)(A)(i). Congress placed the burden of proof on the state in such an action to justify its position, and "to prove that the State has negotiated with the Indian tribe in good faith. . . ." 25 U.S.C. § 2710(d)(7)(B)(ii).

If a state fails to meet its burden of demonstrating that it negotiated in good faith, IGRA prescribes a remedy designed to provide additional opportunities for the state and tribe to arrive at a mutually agreeable compact. First, the federal district court can order the parties to conclude a compact within 60 days—essentially ordering good faith negotiations for that period. 25 U.S.C. § 2710(d)(7)(B)(iii). If no compact is reached, the court then appoints a mediator who considers the "last best offer" for a compact by each side, and selects one. 25 U.S.C. § 2710(d)(7)(B)(iv). The state may accept the mediator's selection, 25 U.S.C. § 2710(d)(7)(B)(ii), or failing that, the mediator notifies the Secretary of Interior, who then prescribes federal procedures, consistent with the mediator's recommendation and the provisions of IGRA, for the conduct of Class III gaming on the tribe's reservation. 25 U.S.C. § 2710(d)(7)(B)(vii).

In short, the compromise of IGRA was to *expand* the potential role of the states in the regulation of Indian gaming through the compacting process. The price to the states of this enhanced participation in Indian gaming was not onerous. The states were required merely to negotiate "in good faith". Tribes, on the other hand, were deprived by IGRA of their right—upheld in *Cabazon*—to undertake gaming opportunities free from state law. In return, tribes obtained a mechanism for addressing unfair treatment by states—the right to seek

prospective relief to require states to comply with their obligation to negotiate in good faith. Unless the federal courts are available to enforce the states' obligation to negotiate in good faith, the "delicately balanced compromise" of IGRA will be unraveled.

ARGUMENT

I. INTRODUCTION

The Eleventh Amendment "implicates the fundamental constitutional balance between the Federal Government and the States." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985). In accordance with the "principles of federalism that inform [the] Eleventh Amendment", *Hutto v. Finney*, 437 U.S. 678, 691 (1978), the Court has recognized that this balance between the federal government and the states encompasses a number of exceptions to state immunity from suit.

The Eleventh Amendment does not bar a suit against a state if the state "has consented to suit, either expressly or in the 'plan of the convention.'" *Blatchford v. Native Village of Noatak*, 501 U.S. ——, 115 L.Ed.2d 686, 694 (1991); *Monaco v. Mississippi*, 292 U.S. 313, 322-23 (1934). Thus, the Eleventh Amendment does not bar suits in federal court by the United States against a state, or by one state against another. *United States v. Texas*, 143 U.S. 621, 644-54 (1892); *South Dakota v. North Carolina*, 192 U.S. 286, 318 (1904). Permitting the federal courts to resolve such disputes was deemed necessary to protect particular aspects of the Constitutional plan.[11]

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[11] *See Monaco v. Mississippi*, 292 U.S. at 328 (provision of Constitution authorizing suit by state against another state "necessarily operates regardless of the consent of the defendant state"); *United States v. Texas*, 143 U.S. at 644 ("permanence of the Union might be endangered" if suits by U.S. against states were barred).

Likewise, the Eleventh Amendment does not bar a suit against a state where Congress, acting under a plenary Constitutional grant of power, expressly provides a federal cause of action against a state. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456-57 (1976); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 13-23 (1989). By agreeing to a Constitutional provision that affords such plenary power to Congress—and correspondingly limits state power—the states "relinquished their immunity where Congress found it necessary, in exercising this authority, to render them liable." *Id.* at 20. Without the power to provide for suits against states in these instances, "the congressional power thus conferred would be incomplete. . . ." *Id.* at 19.

Finally, the Eleventh Amendment does not bar actions against state officials for prospective injunctive relief regarding violations of federal law. *Ex parte Young*, 209 U.S. 123 (1908); *Edelman v. Jordan*, 415 U.S. 651, 666-67 (1974). Such actions are necessary "to end a continuing violation of federal law . . . [and] to vindicate the federal interest in assuring the supremacy of that law." *Green v. Mansour*, 474 U.S. 64, 68 (1985).

As these cases reflect, there is often tension between the state interest in immunity from suit on the one hand, and the federal interest in the vitality of certain Constitutional provisions, most notably the Supremacy Clause, on the other. When this occurs, the Court has found a "need to reconcile competing interests"—that is, to resolve the conflict between the state interest in immunity from suit and the other Constitutional interests that are implicated by a particular assertion of state immunity. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984). The Court has reconciled these competing interests by construing the Eleventh Amendment to accommodate other fundamental Constitutional interests. Thus, the exceptions to the immunity provided by the Eleventh Amendment are a mechanism

by which this Court "give[s] life to" fundamental principles of the Constitution that would otherwise be jeopardized by the Eleventh Amendment. *Green*, 474 U.S. at 68.

This case involves the application of two exceptions to the Eleventh Amendment. First, the doctrine of *Ex parte Young* provides that actions for prospective injunctive relief against state officials regarding violations of federal law are permissible. This is such an action, against the Governor. Second, Congress has specifically provided for this suit against the State under IGRA—enacted under its broad authority over Indian affairs. For essentially the same reasons that *Ex parte Young* permits actions for prospective relief to protect the supremacy of federal law, Congress has the authority to provide for this action for prospective relief to vindicate IGRA's requirement that the state negotiate in "good faith."

II. THIS ACTION AGAINST THE GOVERNOR IS PERMISSIBLE UNDER THE DOCTRINE OF *EX PARTE YOUNG*, 209 U.S. 123 (1908)

This case involves only a claim for prospective injunctive relief and related declaratory relief. The Seminole Tribe seeks to have the defendants conform their future conduct to the requirement of IGRA that, upon receipt of a request by a tribe for a gaming compact, they "negotiate with the Indian tribe in good faith to enter into such compact." 25 U.S.C. § 2710(d)(3)(A). No money damages or other retroactive relief is sought. Accordingly, as against the Governor, this action is permissible under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908).

Suits against state officials seeking prospective injunctive and declaratory relief regarding violations of federal law are not barred by the Eleventh Amendment. As this Court has stated, "[i]n an injunctive or declaratory action grounded on federal law, the State's immunity *can*

be overcome by naming state officials as defendants." *Kentucky v. Graham*, 473 U.S. 159, 169 n.18 (1985) (emphasis in original). This "important exception" to the Eleventh Amendment was recognized in *Ex parte Young*, 209 U.S. 123 (1908), in which this Court held that "a suit challenging the constitutionality of a state official's action is not one against the State." *Pennhurst*, 465 U.S. at 102. While *Ex parte Young* involved a claimed violation of the Fourteenth Amendment by a state official, this Court has recognized that the doctrine encompasses other violations of federal law as well. *E.g., Edelman*, 415 U.S. at 676-77. Thus, "the Eleventh Amendment does not prevent federal courts from granting prospective injunctive relief to prevent a continuing violation of federal law." *Green*, 474 U.S. at 68. As this Court has emphasized:

> the availability of prospective relief of the sort awarded in Ex parte Young gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law.

Id.[12] The remedy sought by the Tribe here—an order requiring the Governor to stop violating IGRA's directive regarding good faith negotiations—is precisely the kind permitted under *Ex parte Young*.

The Court of Appeals—while not suggesting that this action involves anything but prospective injunctive relief regarding a claimed violation of federal law—nevertheless rejected the application of the *Ex parte Young* doctrine. The Court of Appeals contended first that "the *Ex parte Young* doctrine cannot compel discretionary acts." *Seminole*, 11 F.3d at 1028. But, as the Court noted in *Ex parte Young*, "[a]n injunction to prevent him [a state officer] from doing that which he has no legal right to do is not an interference with the discretion of an officer." *Ex parte Young*, 209 U.S. at 159.

[12] This Court has also articulated limits to the doctrine of *Ex parte Young*. The doctrine does not apply to claims for monetary or other retroactive relief, *Edelman*, 415 U.S. at 678, to cases involving no claim of continuing violation of federal law, *Green*, 474 U.S. at 71, 73, or to claims arising under state law, *Pennhurst*, 465 U.S. at 106. This case, seeking prospective injunctive relief regarding an ongoing violation of federal law, is not subject to any of these limitations.

This action seeks to require the Governor to fulfill the statutory mandate of IGRA that, in response to a tribal request he "*shall* negotiate with the Indian tribe in good faith to enter into such a compact." 25 U.S.C. § 2710 (d)(3)(A) (emphasis added). The plain language of IGRA imposes a duty to negotiate in good faith, if a state wants to have a role in determining the terms under which Indian gaming may take place. Thus, where a Governor participates in compact negotiations—as he did here—IGRA provides that he must negotiate in good faith as a matter of federal law. While IGRA permits the broad exercise of authority by the Governor in determining the terms of a compact, it does not permit him to refuse to negotiate in good faith.[13] The Court of Appeals was simply wrong in characterizing this action as one to compel the exercise of discretion by the Governor.[14]

[13] This Court has recognized that the obligation to "confer in good faith" as defined in section 8(d) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(d), creates a "duty on the parties", notwithstanding the wide discretion afforded to the parties with respect to terms of a "collective bargaining agreement." *N.L.R.B. v. Ins. Agents' Int'l*, 361 U.S. 477, 487-88 (1960). An employer's obligation to confer in good faith under the NLRA is mandatory, not discretionary. The obligation to negotiate in good faith under IGRA—for a state that enters negotiations—should be construed in a like manner.

[14] IGRA provides that if a federal court determines that a state has failed to meet its statutory obligation to negotiate in good faith, the remedy is a series of procedures designed to provide additional opportunities for the parties to reach an agreement, without compelling any action by the state or its officers. 25 U.S.C. § 2710(d)(7)(B)(iii), (iv), (vi), (vii). These procedures do not

The Court of Appeals contended also that the doctrine of *Ex parte Young* does not apply because the suit "in reality is against the state itself." *Seminole*, 11 F.3d at 1029. The Court noted that IGRA imposes duties on "the States" and "not once does it impose duties or responsibilities on a particular officer of the state . . . ." *Id.* The Court of Appeals' analysis misconstrues the doctrine of *Ex parte Young*.

The issue of whether an action against a state officer is in reality one against the state simply does not arise if the action is within the doctrine of *Ex parte Young*. To be sure, this Court has noted that " '[t]he general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter.' " *Pennhurst*, 465 U.S. at 101 (quoting *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963)). But this "general rule" has no application in the context of an action under the doctrine of *Ex parte Young*:

> The Court has recognized an important exception to this general rule: a suit challenging the constitutionality of a state official's action is not one against the State. This was the holding of *Ex parte Young* . . . [W]hen a plaintiff sues a state official alleging a violation of federal law, the federal court may award an injunction that governs the official's future conduct . . .

Pennhurst, 465 U.S. at 102-03. In short, an action for prospective injunctive relief against a state official regarding a claim under federal law is per se not a case against the state for purposes of the Eleventh Amendment. *See Green*, 474 U.S. at 68 ("a suit challenging the

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compel any discretionary act. Indeed, they do not compel any act at all. If a state opts out of the process, and does nothing at all, the only consequence is that the terms for a tribe to undertake Class III gaming will ultimately be set by the Secretary of the Interior.

constitutionality of a state official's action in enforcing state law is not one against the State . . .").

In addition, IGRA's references to "the State" do not render the doctrine of *Ex parte Young* inapplicable. To begin with, "an American State can act only through its officials." *Pennhurst*, 465 U.S. at 114 n.25. Further, *Ex parte Young* was itself an action against a state attorney general to prevent him from enforcing a statute in violation of the Fourteenth Amendment—which contains express prohibitions against actions by a "state", and does not refer to any duties of state attorneys general or other officials. Contrary to the Court of Appeals' position, duties imposed on states by federal law are at the heart of the *Ex parte Young* doctrine.[15]

In short, as against the Governor, this action may properly proceed under the doctrine of *Ex parte Young*.

III. CONGRESS HAS THE POWER TO AUTHORIZE THIS ACTION AGAINST THE STATE

A. This Action Does Not Substantially Implicate the Core Interests Underlying the Eleventh Amendment

Earlier this Term, this Court articulated the dual interests at the heart of the Eleventh Amendment—the prevention of money judgments by federal courts that must be paid by state treasuries, and the protection of the integrity owed states as sovereigns in our federal system. *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S.

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[15] *See, e.g., Edelman*, 415 U.S. at 654 n.3, 664 (requiring that a "state plan" for federal benefits conform to specific time and other requirements; no federal law duty imposed on any specified state official); *Native Village of Venetie I.R.A. Council v. Alaska*, 918 F.2d 797, 800-02 (9th Cir. 1990) (upholding an *Ex parte Young* action against state officials arising under 25 U.S.C. § 1911(d), which requires that "every State . . . give full faith and credit" to child custody proceedings of Indian tribes; no federal law duty imposed on any specified state official).

——, 130 L.Ed.2d 245 (1994). This case seeks only prospective injunctive and declaratory relief. In addition, it arises under a federal statute that, far from undermining the integrity of the states, actually enhances the potential scope of state authority. Accordingly, the state interests at the core of the Eleventh Amendment are not substantially involved here.

1. *This action does not seek money damages against the state*

As the Court noted in *Hess*, quoting from Justice Stevens' dissent in Pennhurst:

> Adoption of the [Eleventh] Amendment responded most immediately to the States' fears that "federal courts would force them to pay their Revolutionary War debts, leading to their financial ruin." *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 151 . . . (1984) (Stevens, J. dissenting).

Id., 130 L.Ed.2d at 255. The Court emphasized that "the impetus for the Eleventh Amendment" was "the prevention of federal court judgments that must be paid out of a State's treasury", and affirmed that "the vulnerability of the State's purse" is "the most salient factor in Eleventh Amendment determinations." *Id.* at 260.

Hess, then, reinforced the principle—articulated earlier in *Edelman v. Jordan*, 415 U.S. 651 (1974)—that actions for money damages differ from actions for prospective injunctive relief for purposes of Eleventh Amendment jurisprudence. While the Eleventh Amendment generally bars money damage actions, the Court has invoked the fiction of *Ex parte Young* to permit actions against state officials for prospective injunctive relief regarding violations of federal law. As the Court has stated:

> Both prospective and retrospective relief implicate Eleventh Amendment concerns, but the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law. . . . But compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment.

Green, 474 U.S. at 68 (citation omitted). In other words, notwithstanding the Eleventh Amendment, actions for prospective injunctive relief are not only permissible, but necessary, to protect the supremacy of federal law.

While the Court has thus drawn a sharp distinction between prospective injunctive relief and damages for Eleventh Amendment purposes, it has not yet had occasion to apply that distinction where Congress expressly provides for a cause of action against a state. The leading cases regarding Congressional authority to subject states to suit involve claims for money damages. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989). Likewise, money damages were at issue in this Court's cases articulating the requirement of a clear statement by Congress to subject states to suit. *Blatchford v. Native Village of Noatak*, 501 U.S. ——, 115 L.Ed.2d 686 (1991); *Dellmuth v. Muth*, 491 U.S. 223 (1989); *Welch v. State Dep't of Highways and Public Transp.*, 483 U.S. 468 (1987); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985); *Employees of the Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare*, 411 U.S. 279 (1973).

This case—unlike the prior cases before the Court—involves Congress expressly providing for suits against states only for prospective injunctive relief. The core interest of the Eleventh Amendment—the state treasury—is not at stake here. On the other hand, the fundamental federal interest in the Supremacy Clause—the vindication of federal law—is directly implicated. In *Ex parte Young*

and its progeny, this Court balanced the state interest in immunity from suit and the federal interest in the supremacy of federal law and held that actions against state officials for prospective injunctive relief regarding violations of federal law are not barred by the Eleventh Amendment.

The same reasoning applies here. Indeed, the presence of an express Congressional cause of action against a state reinforces the Supremacy Clause interests that gave rise to the doctrine of *Ex parte Young*. This Court in applying the doctrine of *Ex parte Young* has determined that suits for prospective injunctive relief are needed to protect the supremacy of federal law even where Congress is silent regarding the need for such suits. In this case Congress has expressly provided that such a cause of action is necessary to assure that the integrity of IGRA is not undermined by unreasonable action by a state. It would be an odd result indeed to hold that the Court is free to create the fiction of *Ex parte Young* to permit suits for prospective injunctive relief regarding violations of federal law, but that Congress is powerless to provide for such suits to protect the efficacy of its own statutes. Such a result would be particularly anomalous because the Eleventh Amendment—by its own terms—restricts judicial power, not the power of Congress.

In sum, for essentially the same reasons that suits for prospective injunctive relief against state officials for violations of federal law do not run afoul of the Eleventh Amendment under *Ex parte Young*, suits for prospective injunctive relief against states for violations of federal law—expressly provided for by Congress—are also not barred by the Eleventh Amendment. The Supremacy Clause requires that suits for prospective injunctive relief—like this one—be available to vindicate federal law. The more difficult issue—whether Congress may subject states to suits involving the core Eleventh Amendment interest in protecting state treasuries from federal court money judgments—is not presented by this case.

2. *IGRA enhances state authority over Indian gaming*

Hess states that, in addition to concern for state treasuries, the Eleventh Amendment "emphasizes the integrity retained by each State in our federal system. . . ." *Hess*, 513 U.S. ——, 130 L.Ed.2d at 255. The Amendment " 'accords the States the respect owed them as members of the federation,' " and protects them from "affront[s] to the dignity" properly due them. *Id.*, 130 L.Ed.2d at 255 (citation omitted), 256.

As noted above, under this Court's ruling in *California v. Cabazon Band of Indians*, 480 U.S. 202 (1987), tribes could operate gaming on their reservations free from state regulation. IGRA, however, altered the result in *Cabazon*, providing a statutory scheme enabling states to participate—through negotiation of a compact—in the regulation of Indian gaming. This enhancement of state authority with respect to Indian gaming was not an "affront to the dignity" of the states that would implicate core Eleventh Amendment concerns. *Hess*, 513 U.S. ——, 130 L.Ed.2d at 256. On the contrary, far from encroaching on state sovereignty in a manner inconsistent with the respect due a state, IGRA expanded state sovereignty over tribal affairs in a virtually unprecedented manner.

B. Congress Has the Power to Subject States to Suit in Federal Court When Exercising Its Plenary Authority Over Indian Tribes

While this case does not touch state interests at the core of the Eleventh Amendment, it does involve the substantial federal interest in Congress' authority over Indian tribes. In IGRA, Congress balanced the interests of tribes, states and the United States with respect to Indian gaming. That balance is undermined by the ruling of the Court of Appeals—which ignored the breadth of Congressional authority over Indian affairs.

This Court has upheld "Congress' acknowledged powers of abrogation", *Dellmuth*, 491 U.S. at 227-28, in connection with legislation enacted under section 5 of the Fourteenth Amendment, and under the Interstate Commerce Clause. *Fitzpatrick*, 427 U.S. at 456; *Union Gas*, 491 U.S. at 19-20. In both cases, the Court emphasized that the Constitutional provisions under which Congress acted were intended significantly to alter the balance of federal-state power—providing plenary power to Congress, and correspondingly diminishing state power. The Court held that Congress, operating pursuant to such a Constitutional grant, has the power to subject states to suit, provided that it expresses its intent to do so in clear language.

The Court of Appeals held in this case that Congress enacted IGRA under the Indian Commerce Clause. *Seminole*, 11 F.3d at 1026. As this Court has reaffirmed often, with respect to Indian affairs, the Constitution provides plenary authority to Congress, and diminishes state authority. In other words, the Indian Commerce Clause—while encompassing a different subject matter [16] —shares with the Fourteenth Amendment and the Interstate Commerce Clause the fundamental characteristics held necessary to provide Congress with authority to subject states to suit.[17]

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[16] The Court of Appeals, relying on *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), stated that the Interstate Commerce Clause and the Indian Commerce Clause have different functions which "mandate that they be treated distinctly." *Seminole*, 11 F.3d at 1027. But *Cotton Petroleum* held only that tribes were not properly treated as states for purposes of tax apportionment. 490 U.S. at 191-93. *Cotton Petroleum* did not address any issue relating to abrogation of state Eleventh Amendment immunity.

[17] In *Blatchford v. Native Village of Noatak*, 501 U.S. ——, 115 L.Ed.2d 686 (1991), this Court held that the "plan of the convention" did not limit the application of the Eleventh Amendment to suits by individuals. *Id.* at 694-96. In that case, the Tribe argued that since suits by certain other sovereigns (states and the United States) are not barred by the Eleventh Amendment, suits by tribes are likewise not barred. The Court rejected this argument. *Id.* at 696.

The only abrogation issue in *Blatchford* involved 28 U.S.C. § 1362 —a statute providing federal courts with jurisdiction over federal question actions brought by tribes. The Court held that this general statute—which is silent as to states—did not meet the clear statement test required to find abrogation of state immunity. *Id.* at 698-700.

The Indian Commerce Clause was adopted in response to the deficiencies of the Articles of Confederation, which left power over Indian affairs ambiguously divided between the states and the federal government. Under the Articles of Confederation, as James Madison explained:

> What description of Indians are to be deemed members of a State is not yet settled, and has been a question of frequent perplexity and contention in the federal councils. And how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible.

The Federalist, No. 42, p. 217 (William R. Brock ed. 1992). Finding the arrangement of the Articles of Confederation unsatisfactory in this respect, the Framers adopted the Indian Commerce Clause to centralize the full sweep of Indian affairs in the federal government.

> Madison cited the National Government's inability to control trade with the Indians as one of the key deficiencies of the Articles of Confederation, and urged adoption of the Indian Commerce Clause, Art. 1, § 8, cl. 3, that granted Congress the power to regulate trade with the Indians.

Oneida v. Oneida Indian Nation, 470 U.S. 226, 234 n.4 (1985). The Constitution thus provided full and exclusive federal control over Indian affairs. As described by Chief Justice Marshall:

> That instrument [the Constitution] confers on Congress the powers of war and peace: of making treaties, and of regulating commerce with foreign nations, and among the several States, and with the Indian Tribes. *These powers comprehend all that is required for the regulation of our intercourse with the Indians.* They are not limited by any restriction on their free actions. The shackles imposed on this power, in the confederation, are discarded.

Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832) (emphasis added); *see also United States v. 43 Gallons of Whisky*, 93 U.S. 188, 194 (1876); *United States v. Mazurie*, 419 U.S. 544, 555-56 (1975); *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 83-4 (1977); *Oneida*, 470 U.S. at 234. The broad grant of federal power in the Indian Commerce Clause also limits state authority. As this Court stated, " '[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history.' " *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 168 (1973) (quoting *Rice v. Olson*, 324 U.S. 786, 789 (1945)).

In short, by adopting the Indian Commerce Clause as part of the Constitution, the states effectively consented to Congressional authority to subject states to suit, when Congress acts under the Indian Commerce Clause. Congress, then, acting under the Indian Commerce Clause, had the authority to subject states to suit by enacting IGRA.

C. Congress in IGRA Clearly and Plainly Expressed Its Intent to Subject States to Suit

"Every federal court that has considered the issue has concluded that the IGRA's language reveals a clear intent to abrogate the states' Eleventh Amendment immunity." *Spokane Tribe of Indians v. Washington State*, 28 F.3d 991, 994 (9th Cir. 1994), *petition for cert. filed*, No. 94-357; *see also Ponca Tribe of Oklahoma v. State of Oklahoma*, 37 F.3d 1422, 1427-28 (10th Cir. 1994), *petitions for cert. filed*, Nos. 94-1029 & 94-1030. As the Court of Appeals stated in this case, Congress in IGRA "intended to abrogate the states' sovereign immunity," *Seminole*, 11 F.3d at 1024.

Moreover, the Court of Appeals' finding of clear Congressional intent to abrogate was correct. IGRA meets this Court's requirement of clear, direct language, specifically subjecting states to suit. *See Dellmuth*, 491 U.S. at 227-28; *Pennhurst*, 465 U.S. at 99; *Blatchford*, 501 U.S. ——, 115 L.Ed.2d at 698; *Hoffman v. Connecticut Income Dep't*, 492 U.S. 96, 101 (1989); *see also Astoria F.S. & L. Ass'n v. Solimino*, 501 U.S. ——, 115 L.Ed.2d 96, 104 (1991) (citing *Atascadero* as "requiring plain statement of intent to abrogate immunity of states under the Eleventh Amendment").

In IGRA, Congress specifically directed that tribes may sue states in federal court for failure to negotiate in good faith.[18] IGRA imposes the burden of proof on the state in such a suit,[19] and provides remedies in the event judgment is entered against the state.[20] Congress could not have included these provisions in IGRA without intending to subject states to suit, notwithstanding the Eleventh Amendment. Any other conclusion would deprive these sections of IGRA of all meaning and effect. *See Seminole*, 11 F.3d at 1024. Accordingly, IGRA meets this Court's requirement that Congress must use clear, specific language to subject states to suit.

D. All Factors Support Congressional Power to Subject the State to This Suit

Under this Court's Eleventh Amendment cases, there are four key inquiries in determining whether a state is

[18] 25 U.S.C. § 2710(d)(7)(A)(i).

[19] 25 U.S.C. § 2710(d)(7)(B)(ii).

[20] 25 U.S.C. § 2710(d)(7)(B)(iii)-(vii).

subject to an unconsented suit pursuant to an Act of Congress. First, is the fundamental state interest in protecting its treasury at stake? Second, is the dignity due to state sovereign authority being undermined? Third, did Congress act pursuant to a plenary Constitutional grant, intended to expand federal and diminish state authority? And fourth, did Congress expressly provide for the suit against the state?

In this case, all four factors strongly support a finding that Congress has the power to subject the State to a good faith lawsuit under IGRA, notwithstanding the Eleventh Amendment. The suit is for prospective injunctive relief and does not threaten the fundamental state interest in its treasury. IGRA provides an enhancement of state sovereign authority over Indian gaming, and does not stand as an affront to state sovereignty. Congress enacted IGRA under its plenary power over Indian affairs—a power intended to remove states from the fray of Indian affairs. And finally, the language of IGRA clearly subjects the states to suit. The Court need not address the more difficult issue of Congressional power to authorize suits against states when these factors are aligned differently. All that is required here is a ruling that in the unique circumstances of this case—where Congress, acting pursuant to its broad power over Indian affairs, expressly subjects states to suits for prospective relief only, under a statute that enhances state sovereignty—Congress acted within its authority.

CONCLUSION

For the foregoing reasons, the ruling of the Court of Appeals on the applicability of the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), and on Congress' authority to subject states to suit for prospective injunctive relief under IGRA, should be reversed.

Respectfully submitted,

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